Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF MEDICAL ETHICS IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

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August 31, 1989

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INTEREST OF THE *AMICUS CURIAE*

This brief is filed under Supreme Court Rule 36, with the consent of the parties, on behalf of the American Academy of Medical Ethics as *amicus curiae* in support of Appellants in *Turnock* and Cross-Petitioners in *Hodgson*. The Academy is an educational and lobbying organization with approximately 20,000 physician members, incorporated in 1986 to respond to the challenges to established medical ethics emerging in recent decades. The Academy follows the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy sees an unborn child as a patient deserving protection and the full advocacy of attending physicians. The Academy asks the Court to overrule *Roe v. Wade* or, as in *Webster v. Reproductive Health Services*, to reconsider its application in light of current medical technology.

SUMMARY OF THE ARGUMENT

The majority in *Roe v. Wade* appraised the values implicated in that case by an extended discussion of the history of abortion, reaching erroneous conclusions about the status of abortion under the common law and breaking sharply with the traditional values embodied in the common law and our Constitution. Although conviction for abortion was rare in England before the Eighteenth Century, abortion, along with other killing of unwanted children, was condemned by respected authorities from the beginning of the common law—as illustrated by the strong steps through the centuries, by Parliament and the courts, to punish infanticide. The laws respecting abortion and infanticide applied with full rigor in the United States throughout the colonial era. When new medical technologies lessened the danger to the mother from abortion, abortion became more common than infanticide, and legal institutions turned their attention to abortion.

Abortion has always been socially controlled in the interest

of both the child and the mother, interests that have continually changed as new medical technologies developed. Changes in the technology of abortion altered the maternal interest in obtaining the procedure, while developing reproductive technologies reinforced increasing certainty that a conceptus is a "person" from the earliest stages of gestation. The moral and legal implications of such technical developments are not merely medical questions; such implications raise questions of social policy and values.

Legislatures are better placed than courts to devise appropriate regulatory responses to rapidly changing human reproductive technologies because legislatures are better able to assemble the information necessary to assess the import of the changing data in balancing of the interests created or reinforced by those technologies. Courts are ill-suited to sit as boards of review for the implications of changing medical technologies. In the present state of flux, the model of states as laboratories for social policies is especially apt.

For the foregoing reasons, *Roe v. Wade* should be overruled. If *Roe v. Wade* is to continue to survive in some form, the Court will find itself, as in *Webster v. Reproductive Health Services*, caught up in a continual reexamination of the application of the *Roe* criteria in light of the constantly changing medical technology.

ARGUMENT

I. *Roe v. Wade*, Based upon Erroneous Notions of the Historical Status of Abortion under the Common Law, Broke Sharply with Long Established Traditions and Values of the Common Law and our Constitution

More than half of the majority opinion in *Roe v. Wade*, 410 U.S. 113, 129-152, 156-162 (1973), was given to a history of abortion, using this history to inform the values at stake in the controversy before the Court. This approach is hardly surprising as the Court has long interpreted the open-textured language of the Constitution through resort to underlying legal

and social traditions forming the background against which the Constitution was written. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The liberty guaranteed by the due process clause of the Fourteenth Amendment particularly includes "those privileges long recognized in common law as essential to the orderly pursuit of happiness" by free people. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). That liberty is fundamental if it is "deeply rooted in this Nation's history and traditions." *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). Thus, historical errors, and flawed inferences drawn from those errors, would seriously undermine the entire edifice built on *Roe v. Wade*.

The majority in *Roe v. Wade* concluded that "it now appear[s] doubtful that abortion was ever established as a common law crime", 410 U.S. at 136, and that abortion statutes in the United States were not generally adopted until after the Civil War (i.e., after the Fourteenth Amendment was adopted). *Id.* at 139. Both conclusions are wrong.

While research has not uncovered any record of actual punishment[1] for abortion in England before 1732 *if* the abortion was voluntarily undertaken by a woman without serious injury to herself *or* without a live birth before the death of the child, indictments and appeals of felony[2] have been found back at least to 1200 for abortion without either aggravating factor.[3]

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[1] Often the only records extant are terse notes of an indictment which do not indicate what happened at trial. Many of these records do note a finding of "not guilty" rather than a dismissal of the proceeding. *See* note 9 *infra*.

[2] Many of the indicments and appeals in this brief have not been published in the United States. The most important unpublished cases are *R. v. Webb* (Q.B. 1602), *infra*, and *R. v. Beare* (Q.B. 1732), *infra*. I am grateful to Dr. John Keown, of the University of Leicester, for providing me with the text of these and some other early cases. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). I am also indebted to Mr. Philip Rafferty of Los Angeles, who made available his research and that of Dr. J.H. Baker, of St. Catherine's College, Cambridge University. Dr. Baker's book, *An Introduction to English Legal History* (2d ed. 1979), is a leading text for the study of the topic.

[3] *See, e.g., R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414

(footnote continued)

Later, a woman was indicted for self-abortion; apparently, she was saved from punishment only by a general pardon. *R. v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surray Indictments, Eliz. I at 512 (no. 3146) (J. Cockburn ed. 1980).[4] Less than 12 months earlier, a court had held a man for murder when an abortus died after being born alive. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601). Secondary authorities on the common law and judicial dicta also frequently condemned abortion.

Against that background, beginning with "Lord Ellenborough's Act" in 1803, 43 Geo. III, c. 59, criminal statutes expressly prohibiting abortion spread rapidly throughout the common law world. In the United States, 70% of the states (with 85% of the American population) had such statutes by 1861. By 1895 abortion was clearly a serious crime in every state.[5]

Footnote 3 continued

at 57-58 (no. 24) (E. Kimball ed. 1959); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306 at 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978); *Juliana's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897); *Porte's Appeal* (1249), Just. 1/175, m.38; *Sauter's Appeal* (1221), Pleas of the Crown for Gloucester Cnty. 1221 at 16 (no. 69) (F. Maitland ed. 1884); *R. v. le Petiprestre* (1244), The London Eyre of 1244 at 48 (no. 116) (London Rec. Soc'y 1970); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes' Appeal* (1200), 1 Selden Soc'y, *supra* at 39 (no. 82). Abortion was covered by even earlier compilations of the common law, which required payment of a full *wergeld* (a money payment to relatives of a slain person to settle the claims for homicide) if the child were "living", and a half-*wergeld* if not "living". *Leges Henri Primi* c. LXX.14 (L.J. Downer ed. 1972). [This was a 12th Century compilation of sources on Anglo-Saxon law as modified by the early Norman kings.] Several of the cases noted here were settled by money payments, perhaps as *wergeld*.

[4] Whether the pardon came before or after conviction is unclear, although the editor of the records infers that Webb was convicted before she was pardoned, Keown, *supra* note 2, at 173 n.23.

[5] *See generally* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 389-407 (1979); Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means.[6] Means' history of abortion was neither objective nor accurate. Nor have these inadequacies been resolved by James Mohr's somewhat different history of abortion.[7] Mohr and his followers would shift the focus from an increasingly clear history of the law of abortion to the far less certain issue of the "true" social attitudes concerning abortion. Mohr's approach simply discounts records of attitudes he disagrees with either in favor of other, similar records of attitudes he finds useful, or even in favor of presumed unrecorded opinions of historically mute classes.

Such purportedly sociological approaches to history never stoop to explain why, if the publicly expressed attitudes of formal social institutions did not represent the true values of the society, those institutions chose to express themselves in such unrepresentative terms, or why these terms continue through major changes of social and political structure. This approach does permit one to infer almost at will what the true attitudes were, but it overlooks that the Constitution is a legal document. Ultimately, legal traditions must inform the Constitution; the social, medical, and moral context is useful only to illuminate those legal traditions, and not as an independent source of claims of right. Rather, the unbroken legal tradition, extending over more than seven centuries of social life, condemning abortion and other aggression against unwanted children, is the distillation of the moral sense of the community.

[6] Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right of Ninth-Amendment about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (hereafter cited as Means II); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) (hereafter cited as Means I). The majority cited Means seven times during its depiction of the history of abortion—without noting that he was then the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[7] J. Mohr, *Abortion in America* (1978).

A. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion

Indictments of abortionists at common law were far more common than was thought in 1973.[8] Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records do not indicate any punishment, the many clear records of judgments of "not guilty" demonstrate that the indictments and appeals were valid under the common law.[9]

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[8] Abortion was also punished by the ecclesiastical courts of the time. *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 2 at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-381 (1975). That a crime was punished in ecclesiastical courts does not establish that it was not punishable at the common law. Keown, *supra*; Helmholz, *supra* at 386. Nor does ecclesiastical interest indicate that such prosecutions must be seen as religiously based: many modern legal topics that today are unquestionably secular, such as wills, slander, and enforcement of simple contracts, originated in the ecclesiastical courts. 1 W. Holdsworth, *A History of English Law* 65-77, 455-457, 580-632 (1938); 3 Holdsworth at 408-428, 441-454, 534-536; 5 Holdsworth at 167-169, 197-218, 291-299; 8 Holdsworth at 301-307, 324-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 5, at 382-387. Also, in English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England". 1 M. Hale, *History of the Pleas of the Crown*, preface (1685).

[9] *See R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422 at 296 (no. 523) (1968); *Gras's Appeal* (1276?), The London Eyre of 1276 at 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal* (1276?), Eyre of 1276 at 61 (no. 222); *Serlo's Appeal*, Eyre of 1276 at 62-64 (nos. 157-158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal* (1249), Just. 1/359, m.36; *Paiards's Appeal* (1249?), Just. 1/174, m.40d; *Orscherd's Appeal* (1249?), Just. 1/174, m.40d; *Gundewine's Appeal* (1247), Just. 1/274, m14d; *Phina's Appeal* (1246), Just. 1/778, m.57, summarized in Meekings, *supra* at 267; *Aubyn's Appeal*, The London Eyre of 1244 at 50-51 (no. 124) (London Rec. Soc'y 1970); *Avener's Appeal* (1244), Eyre of 1244 at 36

(footnote continued)

Means wrongly asserted that there were only two cases before 1600 dealing with abortion, and that the courts in both cases indicated doubt about whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [*see* Appendix A] (dubbed by Means as *the Twinslayers' Case*); and *R. v. Anonymous*, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) (K.B. 1348) [*see* Appendix B] (dubbed by Means as *the Abortionist's Case).* Means (and the *Roe* majority) relied on a faulty rendering of *R. v. de Bourton* for his analysis. Even if these problems are overlooked, Means' highly partisan analysis contained serious errors as even supporters of his ultimate conclusions have acknowledged.[10]

Even if the faulty text of *R. v. de Bourton* is taken as definitive, at most it, like *R. v. Anonymous*, shows a court declining to prosecute through uncertainty over whether a case was properly before the court, not because of the non-criminality of abortion.[11] In *R. v. de Bourton*, the defendant apparently had been released on bail to answer for another charge, and actually was given a special pardon before trial. In *R. v. Anonymous*, the defendant escaped conviction because the indictment failed to state a baptismal name for the deceased,[12]

Footnote 9 continued

(no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-561 (no. 1336) (1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). At least once the proceeding was aborted by the ancient form of benefit of clergy, which precluded trial. *Philippa's Appeal* (1276?), Eyre of 1276 at 51 (no. 187).

[10] *See, e.g.*, Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: the Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. His. 20, 22-29 (1984).

[11] *See generally* Dellapenna, *supra* note 5, at 368-370; Keown, *supra* note 2, at 4.

[12] This ignores the fact that "murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 Holdsworth, *supra* note 8, at 65-77, 580-632; 1 F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I* 67-68, 545 (2d ed, 1898); 2 Pollock & Maitland at 480-486.

and because it was impossible to know if the defendant killed the child—grounds that are procedural and evidentiary, not substantive, grounds.[13] Influential contemporary commentators on the common law also declared abortion of a woman "quick with child" to be a criminal homicide.[14]

After 1500, cases became more common. First, a coroner's inquest ruled that death by abortion was "felonious suicide"; the man involved was released, as an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) [*see* Appendix B].[15] Later, a man died before trial for giving a potion to a girl to induce an abortion. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m11d (1531).[16] Yet later, a woman was convicted of abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581) [*see* Appendix B].[17] Yet another court held that accusing a woman of offering abortifacients to another supported an actin for slander and were sufficient grounds for a court to require a bond for good behavior. *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586).

Curiously, two Sixteenth Century authorities on common law criminal pleadings denied that abortion was a felony. 1 W.

[13] *Cf.* Winfield, *The Unborn Child*, 4 U. Tor. L.J. 278, 280 (1942).

[14] 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta* 60-61 (Selden Soc'y ed. 1955). *Britton* 95-96 (F. Morgen ed. 1901) disagreed—because of the lack of a baptismal name for the victim.

[15] *See also R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589); *R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec.Off., ref: Ancient Indictments 434, 12. *See* Keown, *supra* note 2, at 6.

[16] *See also* 2 *Reports of Sir John Spelman* 306 (J. Baker ed.), 94 Selden Soc'y 306 (1978).

[17] Some have said that Turnour was executed for abortion, but as she was convicted of several acts of witchcraft, only one of which was abortion, the record is unclear as to why she was executed; even if abortion were why she died, the crime was witchcraft, and not criminal abortion or homicide as such. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I at 212 (no. 1225) (J. Cockburn ed. 1978).

Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-218 (1st ed. 1581). Yet an early formbook, with four editions between 1506 and 1544, included a form indictment for abortion by physical assault on the mother. *Boke of the Justyces of the Peas* c. vi, fol. iii (1515). Perhaps Staunford and Lambard only reflected uncertainty from the poorly reported decisions; or perhaps they meant that abortion was a crime less than a felony; or perhaps they meant that abortion properly belonged before a court other than the Queen's Bench. Three centuries later, Sir John Stephen concluded that they meant that abortion was properly brought only before ecclesiastical courts. 1 J. Stephen, *A History of the Criminal Law of England* 54 (1883). If so, they were wrong.

Some part of the Sixteenth Century legal activity regarding abortion did represent a secularization of matters formerly left to the ecclesiastical domain. Ecclesiastical activity directed at abortion declined during the Reformation,[18] and common law courts took full responsibility for abortion,[19] in a process culminating in a series of decisions in the Seventeenth Century that clearly establish, if the cases already noted did not, that abortion was a serious crime.

In 1601, two Queen's Bench Justices held an abortion which kills a child after a live birth is murder, *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601) [*see* Appendix B],[20] stating that the birth and

[18] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979).

[19] Witchcraft became an indictable crime by the statute of 5 Eliz. I, c.15 (1573); within eight years, we find *R. v. Tournour, supra*.

[20] There were a number of possible precedents for the decision, but *R. v. Sims* seems finally to have settled the matter. *Sims* itself was an action in trespass, which at the time still was a hybrid action combining both criminal and civil elements. For the evolution of medieval trespass into both modern crimes and modern torts, *see* 2 Holdsworth, *supra* note 8, at 364-365; 3 Holdsworth at 317-318, 609-611; 4 Holdsworth at 512-515; 2 Pollock & Maitland, *supra* note 12, at 510-524.

subsequent death of the child permitted proof of the cause of death.[21] In 1602, in *R. v. Webb*, Calendar of Assize Rec., Surray Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980) [*see* Appendix B], a woman apparently was convicted and pardoned[22] for self-abortion with rat poison. Finally, in 1670 Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous*, M. Hale, *History of Pleas of the Crown* 429-430 (1685).[23]

R. v. Sims was argued before the court by Attorney-General Sir Edward Coke (the "Father of the Common Law"). In his *Third Institute* 50-51 (1644), Coke generalized a principle from the case that abortion after quickening was "a great misprision [a serious misdemeanor], and no murder" if the child died in the womb, and a murder if the child died after birth. Coke's position thereafter was accepted virtually without question.[24]

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[21] For the primitive state of forensic medicine nearly three centuries later, *see* Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981).

[22] *See* note 4 *supra*.

[23] For other Seventeenth Century indictments without record of the outcome, *see Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615 at 345 (1936).

[24] 1 W. Blackstone, *Commentaries* 129-130 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown* 227-230 (1803); M. Hale, *Pleas of the Crown* 53 (1682); 2 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-618, 796 (1819). Two books are attributed to Hale. The one cited here echoed Coke's views; a later book, Hale, *supra* note 8, at 433, denied that an abortion-induced death of a child born alive is a homicide. Which view truly represents Hale's opinion is not known. Courts cited Coke with approval in a variety of contexts, and did not follow the second Hale dictum. *See Millar v. Turner*, 1 Vessey 86 (K.B. 1748); *Beale v. Beale*, 24 Eng. Rep. 373 (K.B. 1713); Keown, *supra* note 2, at 10-11. *See generally* Dellapenna, *supra* note 5, at 379-389.

Coke cited only the inconclusive precedents of *R. v. de Bourton*, *supra*, and *R. v. Anonymous*, *supra*, for his views.[25] Hale cited no precedents at all for his holding.[26] Means dismissed Coke's statement on abortion as a "masterpiece of perversion",[27] yet found Hale's decision on the death of the mother to be "an act of Restoration gallantry".[28] Means did not indicate how to recognize the difference.

By the early Eighteenth Century, the criminality of abortion under the common law appears well established. Courts had given increasingly clear holdings that some abortions were crimes; there was no decision indicating that any form of abortion was lawful. Secondary authorities, especially after 1600, equally supported the criminality of abortion. Yet few cases recorded punishment for any abortion, and none recorded punishment for a voluntary abortion without *either* death for the mother *or* death subsequent to live birth for the child.

B. From Earliest Times, English Law Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened through the Centuries, to Punish Violations of These Prohibitions

The great majority of the cases thus far noted involved crude physical batterings of the mother—often to her serious injury

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[25] *Cf. R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414 57-58 (no. 24) (E. Kimball ed. 1959).

[26] Hale might have cited, *R. v. Adkyns* (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I at 510 (no. 3054) (J. Cockburn ed. 1975); *R. v. Meadow* (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I at 233 (no. 1212) (J. Cockburn ed. 1975); *R. v. Poope* (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I at 289 (no. 1751) (J. Cockburn ed. 1975). *See also Philippa's Appeal* (1276?), London Eyre of 1276 at 51 (no. 187) (London Rec. Soc'y 1976) (defendant escaped trial due to benefit of clergy); *Orscherd's Appeal* (1249?), Just. 1/174, m.40d (not guilty).

[27] Means II, *supra* note 6, at 359. His view apparently was accepted by the majority in *Roe v. Wade*, 410 U.S. at 135 n.26.

[28] Means II, *supra* note 6, at 363.

or death (injury techniques).[29] The remaining abortions were induced by "noxious potions"—potions that appear to have been nearly as deadly as the batterings (ingestion techniques).[30] From these facts, one might infer that the law was directed at protecting the mother's life or health—if one assumes, as Means, Mohr,[31] and numerous others do, that abortion was always freely available through reasonably safe means.

Both the ingestion and injury techniques found in the legal cases could be effective only with great pain and substantial risk of death or permanent injury; undergoing either cannot have been popular.[32] In fact, voluntary abortions are almost

[29] Injury techniques ranged from ineffective simple bodily manoeuvres up to savage assaults, such as cutting her open and removing the infant.

[30] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion often was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among medically primitive cultures, anthropologists have found injury techniques to be most common, if only because of the greater certainty of success. G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1955). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-108 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

[31] Mohr, *supra* note 7, at 6-19, listed methods he assumed to be safe and effective, which was unfounded—even he acknowledged the poisonous nature of some of his "abortifacients". *Id.* at 71-73. E. Shorter, *A History of Women's Bodies* 177-191 (1982), also assumed that workable techniques existed, although he admitted that his own catalogue included only the useless or the fatal. Other historians have made the same assumption on even less evidence, A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); McLaren, *supra* note 30, at 5-7, 107, 111-114; G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979); C. Smith-Rosenberg, *Disorderly Conduct* 228 (1985). Compare the text and notes at notes 34-38 *infra*.

[32] *Even Shorter, supra* note 31, at 177, concluded that until after 1880 only truly desperate women would risk abortion. Quaife, *supra* note 31, at 26, describes injury techniques in connection with his analysis of violence, and not with his analysis of abortion, while he concedes that women were rarely anxious to use ingestion techniques. *Supra* at 118.

absent from reported cases before 1732[33] for a simple reason: techniques of the time were tantamount to suicide.[34] Thus abortion which was not a crime against the mother was rare.[35]

The unpopularity of injury techniques hardly needs demonstration. While we cannot know all potions available in medieval England, surveys of the medical literature there and in other medically primitive societies demonstrate that the potions ingested to induce an abortion were either ineffective (except for any suggestive powers to which a woman might be susceptible) or highly dangerous.[36] Savin oil was the "abortifacient" most widely reported in medieval English sources. Modern research demonstrates that it works by undermining a

[33] The only apparently voluntary abortions reported were *R. v. Wynspere*, *supra* note 12, and *R. v. Webb*, *supra* note 22. In some cases, assertions that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely in the numerous cases of aborton by savage physical attack.

[34] Devereux, *supra* note 30, at 149-150. *See generally* Dellapenna, *supra* note 5, at 372-376, 393-395.

[35] One attempt at a study of the incidence of abortion in the early modern period, based on searching church records (which do not distinguish between spontaneous and induced abortions), P. Laslett, *The World We Have Lost* 123 (1966), found abortions in Seventeenth Century England to amount to 6-7% of total births. As in the Twentieth Century spontaneous abortions range from 7.5-11% with our more advanced medical technology, *id.* at 266, the Seventeenth Century figures reveal few, if any, induced abortions.

[36] Bates & Zawadski, *supra* note 30, at 14-23, 85-91; Devereux, *supra* note 30, at 36-43, 249, 279; N. Himes, *Medical History of Contraception* 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 31, at 179-188; Taussig, *supra* note 30, at 31-45, 352-357; Dellapenna, *supra* note 5, at 373-376. Examples of ineffective "abortifacients" available in England include goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs the ingestion of which in massively dangerous quantities could bring on a abortion included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin oil (juniper), tansy tea, thyme, and yarrow. Finally, a sufficiently desperate woman could ingest (or be made to ingest) a substance lethal even in small quantities, such as aloes, arsenic, "ratsbane" (rat poison), snake venom, and various metallic salts.

woman's health generally so she could not sustain pregnancy, all too often to the point of death.[37] The dangers of these "abortifacient potions" were so great that in early English slang the term "poisoned" meant pregnant![38]

One cannot entirely rule out the possibility of a safe and effective drug escaping notice in the legal, medical, and popular literature of the day. Yet the Arabic medical texts which, upon translation into Latin, were standard medical references in the later middle ages described nothing more safe and effective than the potions listed here.[39] Nor do later works in English add anything significant.[40] Given the general limited inventiveness of pre-scientific societies, one also must not be surprised at the lack of variation in abortion techniques over six centuries.

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[37] One modern study found that savin oil did induce an abortion in 10 of 21 women who consumed it: nine of the 10 "successful" ones died, as did four of the "unsuccessful" ones. Taussig, *supra* note 30, at 353. In fact, most modern poisons were discovered through vain searches for a safe dosage of "abortifacients". Bates & Zawadski, *supra* note 30, at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 21. *See generally* Shorter, *supra* note 31, at 186-188.

[38] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785); McLaren, *supra* note 30, at 102. Yet another historian, who optimistically presumes that knowledge of safe and effective abortifacients was widespread, also notes that lead-poisoning was "epidemic" because of the use of the abortifacients. J. Weeks, *Sex, Politics and Society* 72 (1981). Even Mohr, *supra* note 7, at 71-73, notes that savin poisoning was widespread from abortion.

[39] Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497). *See also* Himes, *supra* note 36, at 139-151.

[40] 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). These and other texts describe "abortifacient" effects in language markedly different from the descriptions of other pharmacological effects. "Abortifacient" effects are always introduced with phrases suchas "it is said", suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 30, at 102-104, 123; Noonan, *supra* note 36, at 201-207, 217.

Singularly lacking from the literature is any mention of "intrusion techniques"—techniques using an intrusion through the cervix into the uterus to induce abortion.[41] Given the primitive knowledge of a woman's reproductive anatomy,[42] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are occasional mentions of a "pessary"—the insertion of a vaginal suppository, usually laced with "abortifacient drugs", that did not penetrate the cervix. Without such penetration, however, pessaries do not seem to have been effective.[43]

Many still persist in believing that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe, effective, and perhaps relatively painless. If so, why would simple, safe, and effective folk medicines abruptly disappear in the Nineteenth Century to be replaced by the highly dangerous intrusion techniques that supposedly then made abortion so dangerous as to justify the widespread adoption of statutes proscribing abortion? The true explanation was expressed by Mary Kenny: before the Nineteenth Century, "[t]he traditional forms of abortion had been infanticide and abandonment."[44]

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[41] Even Shorter, *supra* note 31, at 188-191, concedes that instrumental (intrusion) abortions were not a realistic possibility before the Nineteenth Century. *See also* Devereux, *supra* note 30, at 28, 36-37.

[42] Consider contemporary views of how such potions functioned. Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but the potions were sometimes given to prevent a woman's uterus from rising to her throat to choke her! Shorter, *supra* note 31, at 180, 286-287.

[43] Devereux, *supra* note 30, at 37; McLaren, *supra* note 30, at 101-102; Taussig, *supra* note 30, at 355-356. The ineffectiveness of pessaries did not prevent doctors from swearing a Hippocratic Oath not to administer them, at least as the oath was before it was amended after *Roe v. Wade*. A. Castiglioni, *A History of Medicine* 148 (2d ed. 1947).

[44] M. Kenny, *Abortion: the Whole Story* 181 (1986).

Infanticide was a crime under the early common law;[45] Parliament reacted to its frequent occurrence[46] by enacting ever stronger statutes prohibiting the practice. The royal courts also actively punished those found guilty of the crime.[47] All this occurred when both the incidence of true abortion and legal activity regarding it were still rare.

The stringency of the law of infanticide is shown by *R. v. Parker*, 73 Eng. Rep. 410 (1580), where even benefit of clergy was denied and a clergyman was executed for the crime. The earliest regulations of midwives (1512) were to prevent the killing of infants.[48] The tightening of the law against infanticide culminated in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624), which conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

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[45] Infanticide was a crime in Anglo-Saxon law. J. Thrupp, *The Anglo-Saxon Home* 85 (1862). At least one early book (ca. 1300) states that infanticide within one year of birth was cognizable only by ecclesiastical courts. *Mirror of Justices* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra* note 4, at 478 n.1, dismissed this book as worthless. Staunford, *supra*, at ch. 13, and Lambarde, *supra*, at 217-218, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they apparently denied that abortion was a common law felony).

[46] Dead babies were a common sight in London streets well into the Nineteenth Century. Rolph, *A Backward Glance at the Age of 'Obscenity'*, *32 Encounter 23 (June 1969)*. *See also* D. Bakan, *The Slaughter of the Innocents* (1971); J. Boswell, *The Kindness of Others: the Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); M. Piers, *Infanticide: Past and Present* (1974); Dellapenna, *supra* note 5, at 395-400; Helmholz, *supra* note 8.

[47] P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984).

[48] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses as well as midwives could have been characterized as major population control arrangements. J. Guillemeau, *The Nursing of Children*, preface (1612). *See generally* Dellapenna, *supra* note 5, at 396-397.

Only the emergency of abortion as a real alternative to infanticide brought a decline in the incidence of infanticide and the legal attention to it. The intimate relationship between abortion and infanticide was demonstrated by the fact that the next section of Lord Ellenborough's Act after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. 3 c.58, secs. 2-4 (1803).[49]

C. Early in the Colonial Period, These Laws Were Received with Full Rigor in the United States

The colonists from England brought the common law with them. In just one colony, no less than three prosecutions for criminal abortion arose before 1664: *Proprietary v. Lambrozo*, 53 Md. Archives 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-186 (1652) [*see* Appendix B].[50] In two of these cases, the defendant escaped conviction by, before trial, marrying (and thereby disqualifying) the principal witness against him. Mitchell was indicted for and convicted of attempted murder, apparently because the prosecutor could not prove the cause of the death of the stillborn child.

Other colonial prosecutions for abortion arose at similar early dates. In Rhode Island, a woman was given 15 lashes for fornication and attempted abortion. *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[51] Other charges of abortion through violent physical assaults are recorded without indication of the outcome. *In re the Stillbirth of Agnita Hendricks' Bastard Child* (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681 at 274-275 (1904); *Colony v.*

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[49] For the legislative history, *see Keown*, *supra* note 2, at 12-21.

[50] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658), and *Robins v. Robins*, 41 Md. Archives 85 (1658).

[51] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n. 132 (1980).

Powell (Va. 1635), 7 Am. L. Rec. 43 (1954). Finally, a 1716 municipal ordinance in New York forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122.[52] Abortion simply was never accepted in American society, contrary to the bald assertions of Means, Mohr, and others; nor is there any reason to believe that abortion was more readily available, or more frequently practiced, in the colonies than in England.[53]

Infanticide in the colonies had considerable legal activity against it.[54] The close empirical link of the concealment statutes and abortion was again demonstrated by 11 states which enacted a concealment statute contemporaneously with the state's first abortion statute, while 20 states codified the two statutes together.[55] Thus, from earliest times, colonial society prohibited the murder of an unwanted child by its parents, whether by abortion or by infanticide.

[52] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For reference to a similar ordinance in Virginia, *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[53] C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[54] Hoffer & Hull, *supra* note 47, at 33-113. Statutes were enacted to punish concealment—of either the birth or the death of a child—as murder in eight colonies or states before they adopted an abortion statute, beginning with Massachusetts in 1696. *Charters & Gen'l L. of the Colony & Prov. of Mass. Bay* 293 (Dane, Prescott, & Story eds. 1814). There was at least one prosecution for concealment even before a colonial statute was adopted. 2 J. Winthrop, *History of New England 1630-1649* 317-318 (Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide. Hoffer & Hull, *supra* at 55-56.

[55] Dellapenna, *supra* note 5, at 399.

D. When Abortion Became More Common than Infanticide with the Development of Technical Means for Aborting a Woman with a Lessened Danger to Her Life, English and American Law Came to Emphasize Abortion as the Primary Evil

The dramatic introduction of abortion statutes throughout the English speaking world in the Nineteenth Century has been amply documented.[56] The majority in *Roe v. Wade* viewed this development, and the similarly dramatic increase in prosecutions, as a result of Victorian sexual attitudes, fears for maternal health, and concern for the life of the unborn child. 410 U.S. at 147-152. The majority offered no explanation why these reasons became weighty only in the Nineteenth Century.

Means insisted that only the second reason applied.[57] He also did not attempt to explain why fear for maternal health should have come to the fore then and not earlier. Mohr, while recognizing distress over falling birthrates among the middle and upper classes and over a "moral prejudice" favoring the life of unborn children,[58] argued that the real reason was to assure the dominance of the newly organized American Medical Association over its less qualified competitors, especially midwives.[59] He did not explain why these concerns should have won public support, a glaring omission as he insisted that the public supported free availability for abortions. Thus, such

[56] *See* note 5 *supra*. This process occurred throughout most of the world during the same time. Kenny, *supra* note 44, at 183.

[57] Means I, *supra* note 6, at 511-515; Means II, *supra* note 6, at 382-392.

[58] Mohr, *supra* note 7, at 35-36, 85-118, 128, 167-168, 175-176, 182-196.

[59] *Id.* at 32-37, 147-182. *See also* M. Walsh, *Doctors Wanted: No Women Need Apply* (1977). Mohr discounted concern for maternal health because he believed that abortion was safe. *Id.* at 25-40. A similar argument, made across a much broader front, appears in P. Starr, *The Social Transformation of American Medicine* (1982). For a critique of Starr's neglect of the role of technological change in transforming medicine, *see* Brandt, *The Ways and Means of American Medicine*, Hastings Cntr. Rep., June 1983, at 41.

views simply beg the question of why abortion suddenly became a subject of significant legal and social concern in the Nineteenth Century, and seriously misconceive the legal, medical, and social import of the abortion statutes.

Voluntary surgery has nearly always been treated as a private matter between a patient and an attending physician. Until *Roe v. Wade*, voluntary abortion simply was not treated as such a private matter. For example, in 1828 the New York legislature rejected a proposal to ban all surgery unless "necessary for the preservation of life", but accepted another part of the same proposal declaring abortion a crime.[60] This difference is rooted in technological change and social values.

The technological change was the introduction of intrusion techniques in England in the early Eighteenth Century.[61] The new technique first turned up in a legal case when a woman was sentenced to be pilloried and to serve three years in prison for aborting another woman, before quickening, by inserting an iron rod into the second woman's womb. *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732) [*see* Appendix B]. The report of the case is striking for the strong shock the event provoked in the Queen's Counsel and the court. They decry the incident as "barbarous" and "unnatural", particularly mentioning the manner used to induce the abortion, suggesting a novelty unlikely if such techniques where part of the common fund of knowledge of folk medicine at the time. Note also that the case involved an apparently voluntary abortion with no reported lasting ill effects for the mother.

Convictions are reported in similar cases in rather rapid order. *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806) [*see* Apendix B]; *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816). Such abortions, however,

[60] Means I, *supra* note 6, at 451.

[61] Shorter, *supra* note 31, at 188-208, places the invention of effective intrusion techniques as late in the Nineteenth Century. *See also* M. Potts, P. Diggory & J. Peel, *Abortion* 170-188 (1977).

remained highly dangerous: Margaret Tinckler was convicted of murder of the mother. Inserted objects became a highway to infection that could cause loss of the uterus or death, and was sufficiently painful (especially if the uterine wall was pierced) to induce life-threatening shock.[62]

Dangerous and painful as these procedures were, death was not as certain as with the injury and ingestion techniques. Intrusion techniques quickly became the technique of choice, setting the stage for the surgical and other intrusion techniques that account for most abortions performed today. Lord Ellenborough himself seemed to reflect the resulting sudden upsurge in abortions in the preamble to his famous Act: it concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, c. 58. At this time fears of a threat to the health of the mother from voluntary abortion also appear for the first time in the legal and medical literature.[63]

Both England and the American states undertook to codify their criminal law beginning early in the Nineteenth Century. The earliest statutory prohibitions of abortion were part of that process, as was true of Lord Ellenborough's Act, *supra*,[64] and of the New York proposals, *supra*, to regulate abortion and other surgeries. That abortion statutes were part of the codification process suggests an intent to restate the law of abor-

[62] Bates & Zawadski, *supra* note 30, at 85-87. Apparently abortions killed one-third of the women undergoing them early in the Nineteenth Century. Dellapenna, *supra* note 5, at 400, 412.

[63] O. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra* note 24, at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See also State v. Murphy*, 27 N.J.L. 112, 114-115 (1858). *See generally* Keown, *supra* note 2, at 35-38.

[64] Officially styled the "Offenses against the Person Act", the first comprehensive such English statute in English law. *See* 11 *Holdsworth*, *supra* note 8, at 537.

tion, not to change it, particularly when as in New York, proposals to change the law were rejected.

The New York proposals of 1828 highlight other dimensions of the process of codifying the law of abortion. All surgery was highly dangerous for the same reasons as intrusive abortions: infection and shock. Only for abortion were social pressures likely to induce one to undergo the procedure without prior risk to life or limb. Thus aborton statutes could be seen as a response to premature application of new medical technology.[65] The statutes, which quickly broadened their reach to all kinds of abortion at all stages of pregnancy, served to indicate that intrusive abortions were as criminal as abortions by injury or ingestion techniques. The statutes also settled the somewhat uncertain law governing abortion[66] (the very uncertainty of which suggests that the procedure was not something commonly encountered), and perhaps solemnly reaffirmed social policy in the face of changing social behavior.

The broadening of the statutes to all stages of pregnancy suggests the second major motivation behind the Nineteenth Century abortion statutes: protection of the life of the foetus. Many courts expressed this as the major purpose of the abortion statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Moore*, 25 Iowa 128 (1868); *People v. Sessions*, 58 Mich. 594, 26 N.W. 291 (1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 16 Utah 212, 51 P. 1091 (1898); *State v. Howard*, 32 Vt. 380 (1859). Medical and religious leaders also supported this

[65] *See generally* Keown, *supra* note 2, at 12-48.

[66] Note the split in the Nineteenth Century American cases over whether abortion before quickening was a crime at common law: *Mitchell v. Commonwealth*, 78 Ky. 204 (1879) (no crime); *Lamb v. State*, 67 Md. 524, 10 A. 208 (1887) (crime); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845) (no crime); *Commonwealth v. Bangs*, 9 Mass. 387 (1812) (no crime); *Mills v. Commonwealth*, 13 Pa. 630 (1850) (crime).

view.[67] Unless one believes, as Mohr argued, that these were insincere ruses to hide less noble motives, one must concede that protection of unborn children from a rising number of abortions was at least as significant a motive for the Nineteenth Century abortion statutes as protection of the life of the mother.

II. *Roe v. Wade* Should Be Overruled and the Resolution of the Competing Claims of Mothers and Their Offspring Should Be Returned to the Legislative Branches of Government

The abortion problem, a result of the intersection of policies protecting mothers and unborn children with changing medical technology, requires balancing the claims of mother and child that is best left to legislative development rather than dictation by courts. Consider the analysis of the late Professor Alexander Bickel of the trimester scheme from *Roe v. Wade:*

> "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?"[68]

A. Changes in Medical Technology Are Central to a Proper Resolution of the Controversies over Abortion

At all times, evolving medical technologies of abortion and of recognition of, and care for, an individual unborn child, have

[67] The majority in *Roe v. Wade*, 410 U.S. at 141-142, quoted representative samplings of such statements. *See also* Mohr, *supra* note 7, at 35-36, 175-176, 182-196. *See also* notes 59 & 60 *supra*.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (Rehnquist & White, JJ., dissenting).

shaped the interests feeding the abortion controversy. Until the Twentieth Century, both resulting interests converged on criminalizing abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.[69]

Technical progress did not end with a crude insertion device. Modern medical techniques, basic general surgical advances, have further reduced the pain of, and the danger of uterine injury from, an abortion, making the procedure physically safe for the mother. Pain-killing drugs (beginning with morphine in 1806), anesthesia from the 1840's, antiseptics after 1867, and finally sulfa drugs in the 1930's and antibiotics (beginning with penicillin in 1940) have dramatically reduced the risk of death or injury through shock or infection. Many women thus came to see the abortion's prohibition, rather than its possibility, as the threat to their well-being.[70]

Yet the perceived interests of society in unborn children also changed with new medical technologies of human reproduction, shown by the demise of the ancient distinction of "quickening".[71] With the application of cell theory to embryology at the opening of the Nineteenth Century, a revolution in our understanding of human reproduction occurred.[72] Opinion leaders in all areas of society quickly concluded that a new human life began at conception, and not at quickening.[73] The

[69] Even Margaret Sanger, founder of Planned Parenthood, initially condemned abortion. M. Sanger, *Motherhood in Bondage* 394-396 (1928).

[70] *See generally* Dellapenna, *supra* note 5, at 411-414; Potts, Diggory & Peal, *supra* note 61, at 170-188; Shorter, *supra* note 31, at 191-224.

[71] A distinction in English law at least as early as Bracton. *Supra* note 14, at 341.

[72] *See generally* 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[73] *Roe v. Wade*, 410 U.S. at 141-142; D. Callahan, *Abortion: Law, Choice and Morality* 410-461 (1970); Mohr, *supra* note 7, at 35-36, 175-176, 182-196.

adoption of abortion statutes removing any distinction based on quickening[74] highlight that the statutes were crafted to protect human life. In a different context (staying the execution of a pregnant woman), an English court also interpreted the statutory term "quickening" to mean conception, rather than a felt movement of the child within the womb, reflecting again a change in the concept of when human life begins. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).

Today an embryologist or fetologist can diagnose and treat an unborn child independently of its mother, including removing the child from the womb for surgery and returning it to the womb to complete gestation. Such physicians can hardly continue to consider the child a mere extension of its mother, a fact strikingly demonstated by the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist.[75] For one not impressed by claims of fetal personhood, continuing prohibition of abortion in the face of the increasing safety of the procedure for mothers can only seem a serious intrusion into the liberty of women because of "moral prejudice".[76] This view ignores the unbroken tradition of the common law of protecting an unwanted child from aggression by its parents.

Reproductive technology continues to advance rapidly. The majority in *Roe v. Wade* and *Doe v. Bolton* clearly was deeply

[74] The first was the Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837). Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance", Ill. Rev. Code sec. 46 (1827), perhaps suggesting a concern to protect the mother and not the child. Maine adopted the first American statute to remove all distinctions based on quickening, Me. Rev. Stat., ch. 160, secs. 13, 14 (1840).

[75] B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983). *See generally* Dellapenna, *supra* note 5, at 414-416.

[76] *See Doe v. Bolton*, 410 U.S. 179, 193-194, 197-198, 199 (1973), where the majority stressed repeatedly that there was "no reason" to treat abortion differently from other minor surgery.

concerned about physicians' autonomy.[77] Without denying the necessary impact of professional opinion on these questions, and recognizing the virtue of professional autonomy if advances all want are to continue, the law still cannot be fashioned solely to protect the autonomy of the technicians as the issues concerning abortion transcend mere technical competence.

The abortion controversy involves balancing interests and values created or reinforced by changing medical technologies. In all areas of medical practice, except abortion, states have broad authority to regulate acts by physicians. Even for abortion, the social community, not individual physicians, should be the final arbiter of the propriety of conduct. *Simopolous v. Virginia*, 462 U.S. 506 (1983).

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies

The central problem in this controversy is which institution of government is charged by the Constitution to balance the competing interests and values in the abortion controversy.[78] As Justice Stevens argued in his concurring opinion to *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 731-732 (1989), legislatures are better suited to establishing policies for the future, leaving to courts primary responsibility for fashioning remedies for past wrongs. Why should this not apply to abortion? Lacking the tools of inquiry of a legislature, the Court is

[77] *See* particularly *Doe v. Bolton*, where the majority accorded doctors standing as a class, 410 U.S. at 188-189, and the majority repeatedly adverted to the doctors' privacy interest. *Id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother. *Id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979).

[78] *Cf.* A. Bickel, *The Least Dangerous Branch* 142 (1962).

simply not suited to serve as a board of review for the impacts of medical technology. *City of Akron, supra*, at 454-459 (O'Connor, dissenting). Yet, ever since *Roe v. Wade* was decided, the Court has confronted a series of challenges to abortion regulations requiring the Court to devise correct policies in response to difficult questions of technical fitness and social acceptability.[79]

The majority in *Roe v. Wade* itself recognized its inability to deal with the issues at stake when it was unable to decide when a "person" begins. 410 U.S. at 160. Furthermore, these issues require the government to answer difficult questions involving a balancing of interests rather than the application of neutral principles accepted by nearly all in our society.[80]

Legislatures are best equipped to acquire and update the necessary information to assess the import of changing technologies that create or reinforce interests to be balanced in resolving the resulting controversies. Legislatures are also better equipped to strike a balance through their representative nature.[81] Women are not an insular minority whose interests are any longer likely to be slighted by a legislature.[82] Nor need physicians fear such a legislative process. Legislatures consistently have been sensitive to the interests of the

[79] *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Collauti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

[80] *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1976); Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 949 (1973).

[81] *Cf.* R. Dworkin, *Taking Rights Seriously* 22-28 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-310 (1973).

[82] *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

organized medical profession in regulating abortion.[83] There is no reason to expect this to change.

Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), to define federalism in terms of the states as great laboratories for social experiment is one of the best models for approaching questions of whether to preempt state competence. As this Court unanimously affirmed in *Addington v. Texas*, 441 U.S. 418, 431 (1979), the right of states to develop a variety of solutions, consistent with constitutionally-mandated minimum standards, is "the essence of federalism". In an area where the facts change faster than judicial procedures can cope with the resulting issues,[84] courts should defer to the state legislatures as better able to explore regulatory responses to the ensuing problems.

C. If *Roe v. Wade* Is to Continue to Survive in Some Form, the Court Must Continually Reexamine, as It Did in *Webster v. Reproductive Health Services*, the Application of the *Roe* Criteria in Light of New Medical Technology

Justice O'Connor pointed out in her dissent to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983), that if *Roe v. Wade* is to continue as the basis of the law of abortion, it is a decision "on a collision course with itself". *Id.* at 456. To avoid contradicting the values announced in *Roe v. Wade*, the Court must reconsider the rules laid down in, or inferred from, the decision. The Court has begun this process in *Webster v. Reproductive Health Services*, 109 S. Ct.

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[83] The sway of the organized physicians over legislatures was the theme of such books as B. Brookes, *Abortion in England 1900-1967* (1988); Donnison, *supra* note 48; Keown, *supra* note 2; Mohr, *supra* note 7; Starr, *supra* note 59; Walsh, *supra* note 59.

[84] *Cf. Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (White, J., dissenting, with Burger, C.J., & Rehnquist, J.), 101-102 (1976) (Stevens, J., concurring).

3040 (1989). At the very least, if the Court refuses to completely reconsider *Roe v. Wade*, a correct understanding of the history of abortion and the impact of changing medical technology on that history must inform the Court's continuing endeavors to revise the application of *Roe v. Wade* to ongoing state efforts to regulate abortion rationally.

Nowhere does this appear more starkly than with the "live-birth" abortion.[85] Some have argued that the "freedom" protected by *Roe v. Wade* is not the freedom to be rid of an unwanted pregnancy, but the freedom to kill an unwanted child.[86] With the conviction of physicians for killing an aborted child after its birth alive,[87] we have come full circle to the days when the desire to be rid of unwanted pregnancies was expressed as infanticide rather than abortion. To translate unnecessarily, in effect if not in form, an asserted right to be rid of a pregnancy into the right to kill a child is indefensible. It makes a mockery of all efforts to deal with child abuse and mocks the values usually considered as embodied in our government.

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[85] Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984, at B1, col. 1. This had actually become a problem before *Roe v. Wade* was decided, although the leaders of NARAL kept the fact from the Court. L. Lader, *Abortion II* 164-166 (1973).

[86] *E.g.*, "For legal purposes, abortion means feticide: the *intentional* destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus.". G. Williams, *Textbook of Criminal Law* 290 (2d ed. 1983) (emphasis in the original).

[87] *E.g.*, Philadelhia Inquirer, Sept. 29, 1983, at 14A, col. 2.

CONCLUSION

We live in a world in which law and values are increasingly reshaped by science and technology. Nowhere has this process been more dramatic than regarding human reproduction. This case presents an opportunity to return the central questions posed by this developing technology to the political branches of government—branches that can acquire and assess the rapidly changing data to weigh its impact on societal needs and values. For the reasons advanced in this brief, *Roe v. Wade* should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered, and the state statutes upheld as consistent with the values and policies expressed in that decision.

Respectfully submitted,

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Appendix

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APPENDIX A[1]

WHAT REALLY HAPPENED IN *REX v. de BOURTON?* *(a.k.a. the Twinslayer's Case)*

1327-1328

The Uncorrected, Incomplete Year Book Report of R. v. de Bourton Y.B. Mich. 1 Edw. 3 f. 23 pl. 18 (1327)[2]

A writ issued to the sheriff of Gloucester to apprehend one D. who, according to the testimony of Sir G. Scrop, is supposed to have beaten a woman in an advanced state of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop, and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing a felony, the accused was released to mainpernors, and then the argument was adjourned sine die. Thus the writ issued, as before stated, and Sir G. Scrop rehearsed the entire case, and how he [D.] came and pled.

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise of such place, who said, that the same fellow was taken by the mayor of Bristol, but of the cause of this arrest we are wholly ignorant.

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[1] The appendix is adapted from unpublished research of Dr. J.H. Baker of Cambridge University and of Mr. Philip Rafferty of the Los Angeles Bar. On Dr. Baker, *see* note 2 of the brief. All translations are Dr. Baker's. All footnotes are mine.

[2] This is the form of the case known to the later common law commentators such as Staunford, Coke, Hale, Blackstone, and Hawkins, as well as how it is known to all modern commentators. *See, e.g.*, Means II at 337.

The Corrected, Incomplete Year Book Report of R. v. de Bourton[3]

A writ issued to the sheriff of Gloucestershire to take one D., who (by the testimony of Sir Geoffrey Scoop) is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan, but died two days later from the injury which the child had; and the indictment was returned before Sir Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat[4] this thing as a felony, the indictee was released on mainprise [bail] and then this matter remained with a day set, and so the writ was issued as above, and it said that *by testimony of* Sir Geoffrey Scrop *etc.*, *and* recited the whole of the case *as above*, and how he came and pleaded etc., *and that the sheriff should have caused his body to come etc.*[5] And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in question had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. *Therefore, a writ issued to the mayor of Bristol to cause the body to come, together with the cause etc.*

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[3] Dr. Baker uncovered this text by examining the four original manuscripts of the Year Book Report: Lincoln's Inn MS. Hale 72 at fo. 86v; Lincoln's Inn MS. Hale 116 at fo. 3; Lincoln's Inn MS. Hale 137(2) at fo. 11; Bodleian Library Oxford MS. Bodl. 363 at fo. 9v. The four agree with each other and differ from the printed version—some two centuries later than the manuscripts. Matters wholly omitted in the printed text are italicized. Dr. Baker's letter describing his search is on file with Mr. Rafferty.

[4] *d'agarder* ("to award") in all MSS.; *to adjudge* only in the printed version.

[5] The passage is garbled in the printed version, coming after the reference to C.J. Herle, who was Chief Justice of Common Pleas and not of the King's Bench [the court before which this case was heard].

The Original Court Records of Rex v. de Bourton
K.B. 27/270, Rex m.9 (Mich. term 1327)

Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by grace of God king of England, lord of Ireland and duke of Acquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children, and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feat so trampled upon the ground that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of John le Traverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since the mainprise, and detained in our prison of Bristol, on account of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainpernors who mainprise him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile

delivered from prison by the mainprise aforesaid. And have you there the names of those mainpernors, and this writ. And if the same Richard is indicted for any other felonies or tresspasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14th day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he commanded Everarrd Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourten, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtels the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a fortnight from St. Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or tresspasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not or would not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do

and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or tresspasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John le Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespcier, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and tresspasses before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

The Original Court Records of Further Proceedings in R. v. de Bourton

K.B. 27/242, Rex m. 9 (Easter term 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and

which the king caused to come before him), is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all the jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc. he should put in as many and such etc. and have them before the king at the said term etc.

The Original Court Records of the Conclusion of R. v. de Burton, K.B. 27/273, Rex m.12d (Octave of St. John, 2 Edw. III, 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition of whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted—as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has caused to come before [himself] etc.—is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of our present king. Therefore he [is to go] thereof sine die etc.

Dr. Baker's Comments on the Problem of Deciding the True Course of Events in Rex v. de Bourton

These comments are from two letters from Dr. Baker to M.: Rafferty, dated Nov. 6 and Dec. 12, 1985.

From the letter of Nov. 6:

"Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb,

(2) for causing the death of the other (Christened Joan). We do not . . . have the indictment, though as summarized . . . [in the year book report] it does seem that the words of the felony applied to both children. In later entries, the offense is described only as the killing of Joan, but that may have been clerical shorthand.

"The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two goal deliveries in Gloucestershire in the 1320's, but the indictment is not recorded there (K.B. 27/247, Rex m.1d; K.B. 27/255, Rex m.24).

"Bourton pleaded Not guilty, and was released on mainprise to appear at some time before Michaelmas term 1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause . . . . [that] the judges were not minded to treat it as a felony . . . seems to me . . . was not a final determination of that question—indeed the record says that the issue of felony was still pending in 1328—but related only the bail application."

From the letter of Dec. 12:

"As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb of the mother and another (Joan) which died after birth and baptism; that he plead Not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered the facts alleged to amount to a felony or not, except insofar as the case was continued through several terms on the basis that it *was* a felony. (It could be, however, that only the killing of Joan was so regarded.) It is therefore the yearbook report that remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as a felony. The status and meaning of this pronouncement still

seem[s] to me less than clear. For one thing, it seems contrary to the record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of feloniously killing (what we should call manslaughter). That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that bail was not thought to be grantable for murder in medieval times (Y.B. 25 Edw. III, fo. 85; Coke, *Treatise on Bail & Mainprise;* Staunford P.C. 72a), it seems to have been allowable for felony.[6] It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.

"A pardon does not necessarily imply a legal doubt, at this date. Pardons were sometimes granted for favour. This case does look unusual however, because it appears from the patent roll (*Calendar Patent Rolls 1327-1330*, p. 113: Pat. 1 Edw. III, pt. 2, m.17) that Bourton was included in the general pardon of 29 May 1327 but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. (The others were apparently ordinary felons conscripted into the army.)

"The pardon is not to be found in the roll for Hil. 1 Edw. III, which is defective."

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[6] The Statute of Westminster I (3 Edw. I, c. 15, 1275) provides that one indicted for homicide is not mainpernable or replevisable except when he is indicted on "light suspicion". Although Dr. Baker does not advert to "light suspicion", this might explain the apparent confusion in the Year Book reports of the case.

APPENDIX B[1]

OTHER REPRESENTATIVE COMMON LAW CASES ON ABORTION

Agnes' Appeal (1200)
1 Selden Soc'y 39 (no. 82 (1887)

Lincolnshire. Agnes, the daughter of Saxi, appeals John of Paris that whereas she was in labor, he came to her house and dragged her out by the feet and struck her with a certain pole in such a way that she lost her child. And the citizens of Lincoln came and showed a charter of the lord king which witnesses that they should not be impleaded outside the walls of Lincoln (except for their moneyers and officials), and that they ought not to make battle concerning any appeal but to deraign themselves[2] according to the liberties and laws of the city of London;[3] and they prayed this liberty. A day is given to them before the lord king wheresoever he should then be in England on the morrow of St. Edmund to hear their judgment.[4]

Gundwine's Appeal, Just. 1/274, m.14d (1247)

Amice, who was the wife of Ralph Gundwine, appeals Adam Warner, William Warner and Henry Warner that they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severely so that, by reason of that beating, she the said Amice lost her child which was in her belly. And that they did this to her wickedly and feloniously against the peace etc., she offers etc.

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[1] When translations were necessary (*see* the table of contents), in order to achieve consistency, I have used original translations provided by Dr. J.H. Baker (*see* Appendix A n.1) to Mr. Philip Rafferty. All footnotes are mine.

[2] *I.e.*, To vindicate themselves or to prove their innocence.

[3] *I.e.*, trial by wager or law — through oath-helpers.

[4] The outcome has not been found.

And the aforesaid Adam and others come and deny the [breach of the peace], the beating, and the whole etc. and put themselves upon a jury of the township. And they offer the lord king 50 pounds for having the jury therein, by pledge of [12 name_].

And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male five inches long; but they believe that this was rather due to the labor and foolish behavior[5] of the selfsame Amice than to the aforesaid beating.

Juliana's Appeal (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healy ed. 1897)

John de Rechich beat one Juliana, daughter of Maynard, so that he killed her boy in her womb, and fled. Therefore let him be exacted and outlawed. He was received at Stoke Curcy. Therefore [that township] is in mercy.[6] The jurors concealed that matter; therefore they are in mercy. He had no chattels.

Rex v. Anonymous (aka. The Abortionist's Case) (K.B. 1348) Fitzherbert, Graunde Abridgement, tit. Corone, f. 268, pl. 263 (1st ed. 1516)[7]

One was indicted for that he killed a child in its mother's belly, and the opinion [was] that he shall not be arraigned on

[5] *stultum gestum*.

[6] *I.e.*, to be amerced: to pay a fine in lieu of more serious punishment.

[7] Dr. Baker, in a letter to Philip Rafferty (Dec. 12, 1985), indicated that the case does not appear in the various Year Books for 1348, and cannot be traced back before Statham's *Abridgment* (c. 1490, f. 58, pl. 91), which is reproduced in Fitzherbert's *Abridgement*.

this since no name of baptism was in the indictment, and also it is hard to know whether he killed it or not etc.

Rex v. Lichefeld

K.B. 27/974, Rex. m.4 (1505)

Nottir.ghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord in the nineteenth year of the reign of the present lord king [Jan. 5, 1504], at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant,[8] on the twelfth day of December in the year above mentioned [1503] at Basford aforesaid, being inspired by the devil drank various bad and [pure][9] potions in order to kill and destroy the child in her body, and took them into her body, as result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a *felo de se* slew and poisoned herself and the child in her body; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed said felony in form aforesaid, then and there feloniously harbored *the* said Jane . . . .

On the Thursday after the quindent of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged *sine die*.[10]

[8] *puerpera:* perhaps "in labor".

[9] *immaculata*, which Dr. Baker suggests here should be translated as "polluted" although it means the opposite; perhaps, the *im-* here refers to putting something in the potion rather than to negative *-maculata*.

[10] Note that the lack of the allegation "*contra pacem*" in the indictment would also have been sufficient grounds for a demurer.

The Endorsement of the Indictments After Mandamus for Removal to the King's Bench, K.B. 9/513/23d (1530)

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Chesemen, John Brown, Richard Hawkes, and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, tresspasses, and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary in the twenty-first year of the reign of King Henry VIII [Dec. 9, 1529], by the oath etc. of . . . jurors[11] delivered before the lord king on the Saturday next after the quindene of St. John this same term [July 9, 1530], by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

[Sewn to the bill, in the King's Bench file, is a writ dated April 29, 1530, ordering the justices of the peace for Middlesex to send all indictments concerning William Wodlake for appearance "before the king", i.e., before the King's Bench. The writ, tested by Chief FitzJames, is endorsed by Sir John More that all indictments concerning Wodlake have been sent according to the tenor of the writ.]

In the Controlment Roll of the Clerk of the Court, K.B. 29/162/m.11d (1531)

Middlesex. William Wodlake (dead) of the parish of St. Clement Danes in the county aforesame, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders, and misdemeanors of which he is indicted . . . . Afterwrds, in Hilary term 22 Henry VIII [1531] he is to be taken [and brought here] in the quindene of Easter: at which day he is dead. Therefore let the process against him here totally cease.

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[11] Of the grand jury.

***Cockaine v. Witnam*, Hil., 19 Eliz. 1 (1577) (Action for Slander)**

Version 1, Brit. Lib., Ms. Landsdowne 1067, fo. 97

"The Lady Cockeyn [*sic*] offered A.B. her maid a drink in order to murder her child, because her butler had gotten it." And although this was not murder, for the infant was *en ventre sa mere*, the action nevertheless lay.

Version 2: Cro. Eliz. 49, pl. 4 (1586)

Action for words. At the Nisi Prius the defendant pleaded *concord puis le darraine* continuance, judgment *si al enquest*, etc. And by all the justices it was no plea, but he ought to conclude, judgment *si actio*, etc., and so in all pleas pleaded since the last continuance.

Then it was moved, if judgment shall be given upon this, or a new Nisi Prius be granted; and upon good advice judgment was given for the plaintiff, for it was a confession of the matter in issue.

The words were "My Lady Cockaine did offer two shillings to a woman with child, to get her a drink to kill her child, because it was gotten by J.S. Sir Thoma Cockaine's butler." And it was moved the action did not lie for these words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and, if true, there was cause to bind her to good behavior, although it was not said she did give money, or any hurt was done, but that she offered etc. This case was adjudged Hill. 19 Eliz. Intratur, Mich. 17 & 17 Eliz. Rot. 183. *Ex relatione* Chamberlaine. *Vide* 4 Co. 16.b.

Version 3: Harv. L.S. Lib. Ms. 1180(1), fo. 387

For this he vouched a case in Michaelmas 17 & 18 Eliz., roll 483, between Sir John Cockin [*sic*] and his wife and one Wyman [*sic*], because Wyman spoke these words, "My lady Cockin did offer one Bash 10 pounds to get her a drink to destroy the child she went withall, because Mr. Cockin's butler had begotten it";

and it was ruled that an action lay, and yet he did not say that a drink was got, but only an offer to get . . . .

Regina v. Turnour, Assize 35/23/29 (Essex 1581)

Essex: The jurors for [our] lady the queen present that Jane Turnour of Stisted in the aforesaid county, spinster, being a common witch and enchantress, not having God before her eyes, but being seduced by the instigation of the devil, on the eight day of January in the twenty-second year of the reign of the Lady Elizabeth [1580], Queen of England, France, and Ireland, defender of the faith, devilishly and maliciously at Stisted aforesaid, on various days and occasions both before and since, maliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, in the body of the same Helen, being then great with a certain living child, by reason whereof not only was the same Helen then and there on various occasions gravely vexed in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to death. And thus the aforesaid jurors say upon their oath that the aforesaid Jane Turnour, in manner and form aforesaid, on the day in the year aforesaid, at Stisted aforesaid, maliciously and devilishly bewitched and enchanged the aforesaid Helen Sparrowe, and deprived the living child (of which the aforesaid Helen was then pregnant) of his life by reason of these enchangments and bewitchings, contrary to the form of the statute made and provided for such cases, and to the bad and pernicious example of all other offending in such cases, and against the peace of the said present lady the queen. [Note by the clerk:] Puts herself on the country;[12] guilty judgment.

Regina v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601)

Tresspasse and assault was brought against one Sims by the Husband and the Wife for beating of the woman.

[12] *I.e.*, accepts trial by jury.

Coke [Attorney-General]: the case is such, as appers by examination. A man beats a woman which is great with child, and after the child is born living, but hath signes, bruises in his body, received by the said batterie, and after dyed thereof, I say that this is murder.

Fenner & Popham [JJ.], *absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born living, for it be dead born it is no murder, for *non constat*[13] whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death of not, and for that if it be found, he shall be condemned.

Regina v. Webb (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz. 1 at 512 (no. 3146) (J. Cockburn ed. 1980)

Surrey. The jurors for our Lady the Queen present, that Margaret Webb, lately of Godalmyn, spinster, on the tenth day of August, in the forty-first year of the reign of our Lady Elizabeth [1599] by the grace of God Queen of England, France and Ireland, and defender of the faith, with force and arms, and at the aforesaid Godalmyn in the aforesaid county, not having the fear of God before her eyes, but moved and seduced by the instigation of the devil, once ate the poison called "ratesbane" with the intention of spoiling and destroying the infant in the womb of Margaret herself and thus the aforesaid Margaret, by reason of eating the aforesaid poison, spoiled and destroyed then and there the infant in her womb, as a pernicious example to all malefactors offending in like manner, against the peace of our Lady Queen, her crown and dignity.

[13] It cannot be proved.

***Proprietary v. Mitchell*, 10 Md. Arch. 171-186 (1652)**

[The following record of the trial is found at 10 Md. Arch. 182-185; the remainder of the citation consists of extensive depositions providing the evidence brought against Captain Mitchell to prepare the charges.]

The Court this day took into Consideration a Peticon exhibited by Capt. William Mitchell who intended (as it Seems) to have preferred the Same to the Assembly had it gone on the Peticon being as followeth vizt.:

To the Honble the Assembly for regulateing the affairs of the Province of Maryland:

The humble Peticon of Capt. Wm. Mitchell Humbling Shewing That your Peticoner was on Saturday last comitted prisoner to the Common Goal upon a Warrant Signed by Robert Brooke Esq., In which your Peticoner Stands charged in general words with Murther, Atheisme, and Blasphemy, Crimes never in the least acted or within the Intention of your Peticoner. Your Peticoner therefore humbly prays he may be Speedily called to his Answer, and have his liberty restored in Case noe crime in Law be proved against him that warrants his Imprisonment upon the warrant before menconed, And that his Natural filing for which God hath pleased to afflict and humble your Peticoner, may not be pressed against your Peticoner in Cases wherein the Laws of England are Silent, And your Peticoner Shall ever pray.

[Signed] Wm. Mitchell

Upon reading of which Peticon the Court gave direction for a Speedy tryall whereupon his Lordships Attorney, Mr. Hatton, brought in his charge as followeth, vizt.:

May it please this Honble Court: It is fallen to my Lott upon the alteracon in the Government[14] as Attorney to the Lord-

[14] This probably refers to the displacement of the Catholic government of the colony by its first Protestant government in 1652, *Worldmark Encyclopedia of the States* 242 (1981).

Proprietary to be prosecutor against Capt. William Mitchell now prisoner here upon Mr. Brookes Warrant, I could have wished there been no Such occasion, The Crimes for which I am to charge him being Soe many and Soe heynous, that I have not known or heard of the like, It troubles me the rather in regard the Lord Baltemore hath been formerly Soe deceived in him as to place him here in the Seat of Judicature, which by his Scandolous course of life and gross haynous offences, he hath extreamly abused, Whereas he ought (especially Soe placed) to have given good example to others and to imploy that Talent and those abilities of witt and understanding (which almighty God hath indeed in a large measure bestowed on him) to his glory and the publick good, But by Common experience it is apparent, that the chiefest use he hath made thereof hath been to colour over his Villanous Courses, and to mock and deride all Religion and Civil Government, As the Court (in part) take notice by the particulars of his Charge being as followeth Vizt.:

The charge of the Lord Proprietary's Attorney by way of Indictment against Capt. William Mitchell in the name of the Keepers of the Liberties of England by Authority of Parliamt. First: That by his expressions as well as practice (as will as I conceive appear by proofe) he hath not only professed himself to be an Atheist, but hath also endeavoured to draw others to believe there is noe God, Makeing a Common practice by blasphemous expressions and otherwise to mock and deride God's Ordinances, and all Religion, thereby to open a way to all wicked listfull licentious and prophane Courses. Secondly: That he hath Committed Adultery with one Susan Warren. Thirdly: That he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren. And is much Suspected (if not known) to have brought his late wife to an untimely end in her late Voyage hiterward by Sea. Fourthly: That (as I conceive will appear by proofe) he hath Since his late wife's death lived in fornication with his now pretended wife Joane.

And for these and other grosse Crimes and Misdemeanors

(sufficiently I conceive) appearing by proofe, My humble request is that the prisoner may be brought to his Answer, and upon a Speedy tryall may receive punishment according to Justice to God's glory and discharge of the Government in that particular.

To which charge the Said Capt. Mitchell the prisoner by his Answer pleading not Guilty, made Choice to be tryed by a Jury Whereupon these persons following were warned to be of the Grand Jury for the tryall vict: . . . , who being all particularly called by name and attending the Court, The prisoner being demanded whether he could take any personal excepcon against any of them, expressed that he could not but was well Satisfied therein. Whereupon the Jurors were Sworn and their charge given them to bring in a Just and true verdict upon every branch of the Attorneys Charge aforesaid according to evidence to the best of their Skill who after much time Spend therein brought in their Joynt verdict in the words following vixt.:

Vera[15] to the first Soe far as one Deposition with Sundry Circumstances thereunto agreeing Shall be thought valid in Law.

To the Second, third, and fourth: *Billa Vera.*

After the bringing of which verdict the Court discharged the Jurors and the day being far Spent and by reason of other Occasions, the Governor adjourned the Court till the day following.

. . .

Capt. William Mitchell this day referred himself wholly to the determination and Judgement of the Court for all matters charged against him upon which the Grand Jury had given in their verdict the day before not desiring that the Court Should

[15] "True bill" — a good indictment.

be troubled with impannelling another Jury for the further tryall thereof.

This Court therefore takeing the matter into Serious Consideracon upon the perusal of the proofs and in pursuance of the verdict of the Grand Jury for his Several Offenses of Adultery, fornication and Murtherous intention, and in respect of his lewd and Scandalous Course of life Sufficiently appearing upon the proofs doth Order that the Said Capt. Mitchell Shall forthwith pay Five thousand pounds of Tobacco and Cask or the value thereof as a Fine to the Lord Proprietary, And to enter into bond for his good behavior. And that he and his now pretended wife Joane be Seperated till they be Joyned together in Matrimony in the usual allowed Manner, And that paying the Court Charges of imprisonment he is to be discharged of his Imprisonment in the particular.

Rex v. Beare (Derby, England, Aug. 15, 1732)
2 The Gentleman's Magazine 931 (Aug. 1732)

ELEANOR MERRIMAN, now the wife of *Ebenezer Beare*, indicted for a Misdemeanor, in endeavouring to persuade Nich. Wilson to poison his Wife, and for giving him Poison to that End.

Indicted a second time by the Name of *Eleanor Beare*, for a Misdemeanor, in destroying the Foetus in the Womb of *Grace Belfort*, by putting an iron Instrument up into her Body, and thereby causing her to miscarry.

Indicted a third time, for destroying the Foetus in the Womb of a certain Woman, to the jury unknown, by putting an Iron Instrument up her Body, or by giving her something to make her miscarry. Pleaded Not Guilty.

. . .

To the Second Indictment

COUNSEL: Gentlemen, you have heard the Indictment read, and may observe, that the Misdemeanor for which the

Prisoner stands indicted, is of a most shocking Nature; to destroy the Fruit in the Womb carries something in it so contrary to the natural Tenderness of the Female Sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in such a manner as the Prisoner has done, it has really something so shocking in it, that I cannot well display the Nature of the Crime to you, but must leave it to the Evidence: It is cruel and barbarous to the last degree.

Call *Grace Belfort*.

GRACE BELFORD [sic]: I lived with the Prisoner as a Servant about ten Days, but was not hired, and I was off and on with her about fourteen Weeks: When I had been with her a few Days there came Company into the House, and made me drink Ale and Brandy (which I was not used to drink) and it overcame me; my Mistress sent me unto the Stable to give Hay to some Horses, but I was not capable of doing it, so [I] laid me down in the Stable; and there came to me one Ch____r, a young Man that was drinking in the House, and after some Time I feared I was with Child by Ch____r; upon that, my Mistress asked me if I was with Child, I told her I thought I was; Then she said if I could get 30 shilling from Ch____r, she would clear me from the Child, without giving me Physick. A little Time after, some Company gave me Cyder and Brandy, my Mistress and I were both ~~full of Li~~quor, and when the Company was gone, we could scarce get up Stairs, but we did get up; then I laid me on the Bed, and my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some Blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next Day after I went to *Allesiree*, where I had a Miscarriage.

COURT: What did the Prisoner do after that?

EVIDENCE: She told me the Job was done. I then lodged two or three Nights with one *Ann Moseley* (now *Ann Oldknowles*) and coming one Morning to see the Prisoner, I called for a Mug of Ale and drank it, and told her I was going home; then came in *John Clark*, and on the Prisoner's saying I was going home, ~~he s~~aid he would give me a Glass of Wine to help me forward, which accordingly he did, out of a Bottle he had in his Pocket, then I took my leave of him; and when I was a little Way out of Town, I fell down at a Style, and was not well, I lay a little while, then got up, and went to *Nottingham* that night.

Call *Ann Oldknowles*.

COURT: Do you know any Thing of *Grace Belford* having a Miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the Symptoms of Miscarriage on the Bed where she lay.

Call *John Clark*.

COURT: Do you know the Prisoner?

EVIDENCE: Yes, I have frequented her House.

COURT: Did you ever hear her say anything that she had used Means to make a Woman with Child miscarry, by putting any kind of Instrument up their Bodies, or by giving them any Thing to take inwardly?

EVIDENCE: Yes, I have. ——

COURT: Have you seen her Instrument for that Purpose, or have you seen her use any Means to make any Woman with Child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one *Hannah* _____, whose other Name I know not.

COURT: Have you heard her say she had been sent for for these wicked Practices, or had any Reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to *Nottingham*, and, as I remember, she said she had five Pounds for the Journey.

PRISONER: Did you not say you never heard me say any thing of using any Means to cause Miscarriage in any Person, or saw me use any Means for that End?

CLARK: No, I said I never saw you do any thing that Way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the Truth.

CLARK: I do.

Then the Prisoner called several Persons to speak in her Behalf, but only two appeared, and they only gave her Friends a reputable Character, and said the prisoner had a good Education, but they knew nothing of the latter Part of her Life.

MR. MAYOR: The Prisoner at the Bar has a very bad Character, and I have had frequent Complaints against her for keeping a disorderly House.

Many evidences were ready in Court to have proved the Facts she stood charged with in the third Indictment; but his Lordship observing that the second Indictment was proved so plainly, he thought there was no Necessity for going upon the third.

His Lordship summed up the Evidence in a very moving Speech to the jury, wherein he said, he never met with a Case so barbarous and unnatural. The Jury, after a short Consultation, brought the Prisoner in Guilty of both Indictments, and she received sentence to stand in the Pillory, the two next Market-Days, and to suffer close Imprisonment for Three Years.

Derby, August 18, 1732. This day *Eleanor Beare*, pursuant to her Sentence, stood for the first Time in the Pillory in the Market place; to which Place she was attended by several of the Sheriff's Officers; notwithstanding which, the Populace, to show their Resentment of the horrible Crimes wherewith she had been charged, and the little Remorse she has shown since her Commitments, gave her no Quarter, but threw such quantities of Eggs, Turnips, etc. that it was thought she would hardly have escaped with her Life: she disengaged herself from the Pillory before the Time of her standing was expired, jumped among the Crowd, whence she was with Difficulty carried back to Prison.

Rex v. Tinckler (August, 1781)

The Report in the Newcastle Chronicle, Nov. 24, 1781, at 2

Tuesday last Margaret Tinckler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy Clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman . . . [Her plea of pregnancy failed.]

The Published Report, 2 E. East, A Treatise of the Pleas of the Crown 354-356 (1803)[16]

Magaret Tinckler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expresses, as, *that she was going; that she was working out her last;* and exclaim-

[16] This report, which is the one by which the case is generally known, has been verified by Dr. Baker against the original records of the case.

ing, *Oh! that Peggy Tinckler has killed me*. She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinckler had killed her and dear child*, (stating the particular means used, which agreed with the charge in the indictment.) And during the same period she had declared more particularly, "that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone." "That the prisoner gave he the advice" in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th of July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shook her in a very violent manner six different times, and tossed her up and down: and that she afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her to go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only enflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she

had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was *particeps criminis*, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessory to the deceased, yet the deceased was not willingly or knowingly an accessary to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder on the authority of Lord Hale. The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it: and were unanimously of opinion that these declarations of the deceased were legal evidence: for thought at one time the deceased thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being *particeps criminis*, they answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown. And thought the practice be not to convict on such proof uncorroborated, yet the evidence is admissable; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis;* as she considered herself to be dying at the times, and had no view or intent to

serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of confirmatory evidence.